No. 50037-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MASON BLAIR
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable
Cause No. 16-8-00235-34

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

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2. Whether the defendant was denied the means to introduce evidence of the complaining witness's knowledge of the defendant's past sex offenses to support the defense theory of the case.

3. Whether the trial court's late entry of written findings of fact and conclusions of law prejudiced the defendant sufficiently to merit reversal.

B. STATEMENT OF THE CASE.

1. Procedural Facts.

On May 26, 2016, The Thurston County Prosecuting Attorney charged male juvenile M.B. with second degree rape by forcible compulsion of female juvenile E.F. on May 1, 2016. CP 2. An adjudication hearing was held December 12-14, 2016, before the Honorable H. Christopher Wickham. RP 1-264. By oral ruling, Judge Wickham found M.B. guilty of second degree rape. RP 257-62. Written findings of fact and conclusions of law as required under JuCR 7.11(d) were filed on June 16, 2017 by Judge Christine Schaller, on behalf of (now retired) Judge Wickham. CP 36-39.

2. Substantive Facts.

The State accepts the appellant's statement of the substantive facts of the case.

C. ARGUMENT.

1. The trial court did not deprive M.B. of his constitutional rights to present a defense and to confront a witness.

a. Standard of Review.

The Washington and Federal Constitutions provide the individual right to due process. U.S. Const. amend. V, VI, XIV; Wash. Const. art. 1, § 3, 22. The right of a defendant to due process in a criminal trial includes the right to a fair opportunity to defend against the State's accusations. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S Ct. 1038, 35 L. Ed. 2d 297 (1973). The rights to confront and cross-examine witnesses, and to call witnesses in one's own behalf, are also integral to due process. Id. Washington courts retain control over the mode and order of interrogating witnesses when defendants exercise this right.

> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

ER 611(a).

The subject matter of cross-examination is also limited to that of the direct examination, and to matters affecting witness credibility, and Courts exercise discretion to ensure these limitations are enforced.

> Cross examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

ER 611(b).

The general standard for defining the scope of direct examination is "when, in the direct examination, a general subject is unfolded, the cross-examination may develop and explore the various phases of that subject." State v. Ferguson, 100 Wash. 2d 131, 138, 667 P.2d 68 (1983).

A defendant also has the right to cross-examine State witnesses to elicit facts that tend to show bias, prejudice, or interest. State v. Roberts, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980). Cross-examination to show these facts is available as a matter of right, but the trial court still retains discretion to control the exact scope of such cross-examination. State v. Darden, 145 Wash. 2d 612, 620, 41 P.3d 1189 (2002) (also see State v. Jones,

67 Wash. 2d 506, 512-13, 408 P.2d 247 (1965)). Evidence relating to witness credibility sought in cross-examination must also be specific and material, and not merely speculative. "Although the law allows cross-examination into matters which will affect the credibility of a witness by showing bias, ill will, interest or corruption ... the evidence sought to be elicited must be material and relevant to the matters sought to be proved and specific enough to be free from vagueness; otherwise, all manner of argumentative and speculative evidence will be adduced." Darden, 145 Wash. 2d at 621.

A court's limitation of the scope of cross-examination will not be disturbed on review unless the limitation is the result of manifest abuse of discretion. Id. at 619 (citing State v. Campbell, 103 Wash. 2d 1, 20, 691 P.2d 929 (1984)). Whether a defendant's confrontation right has been denied is determined on a case by case basis, depending on the surrounding circumstances and the evidence admitted at trial. State v. Ahlfinger, 50 Wn. App. 466, 474, 749 P.2d 190 (1988) (citing State v. Boast, 87 Wash.2d 447, 553 P.2d 1322 (1976)). The right to cross-examination is also no guarantee of the result desired by the defense. "Generally speaking, the Confrontation Clause guarantees an opportunity for

effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Delaware v. Fensterer, 474 U.S. 15, 20, 106 S. Ct. 292, 88 L. Ed. 2d 15 (1985).

b. Defendant's attempted cross-examination exceeded the scope of the direct examination.

Appellant claims the Trial Court made an arbitrary decision in limiting his cross-examination of E.F. "The court did not even mention M.B.'s right to confront the witnesses against him, treating the matter as an ordinary evidentiary decision." Appellant's Motion at 16. However, the basis of the prosecution's objection was the scope of the direct and cross-examination under ER 611(b), and M.B. did not argue otherwise. 1RP at 145. Here, the State had limited its direct examination of E.F. to her background and to the events of April 30 and May 1, 2017. 1RP 128-144. At no point was the subject of M.B.'s status as a probationer raised, nor was the subject of his past sex offenses raised. The general subject of the family meeting which took place that evening prior to the incident also was not discussed until defense counsel raised it during cross-examination. 1RP 145.

The Trial Court had statutorily-granted discretion whether to permit inquiry into these additional matters on cross-examination, which it properly chose not to allow. The general subject of E.F.'s knowledge of M.B.'s past offenses was never unfolded, and so defense counsel did not have the option of exploring or developing that subject during cross-examination. The Trial Court's refusal to allow it was not a manifest abuse of discretion.

c. The information defendant sought on cross-examination was too speculative to constitute evidence of bias under ER 611(b).

In response to the prosecution's objection during E.F.'s cross-examination, defense counsel did not argue at that time that the sought evidence was for the purpose of showing bias under ER 611(b). 1RP 146. Later during M.B.'s direct examination, the Trial Court then directly asked defense counsel whether the topic of E.F.'s knowledge of M.B.'s past offenses was intended to be evidence of bias affecting E.F.'s credibility. Id. at 205. Defense counsel responded that "it affects her motive." Id. "It affects her reasoning and her ability to accuse my client of rape." Id.

Trial courts may exercise discretion to reject cross-examination where the circumstances only remotely tend to show bias or prejudice of the witness, where the evidence is vague, or

where the evidence is merely argumentative and speculative. Darden, 145 Wash. 2d at 620-21 (citing Jones, 67 Wash. 2d at 512-13) (also see State v. Knapp, 14 Wash. App. 101, 108, 540 P.2d 898 (1975). Here, the specific information in question is E.F.'s knowledge of M.B.'s past sex offenses. Appellant claims that this knowledge, combined with the fact that E.F. had a boyfriend, demonstrates motive to lie and which furthermore constitutes evidence of bias. Despite the fact that this theory draws inferences upon inferences to reach that conclusion, it also does not make E.F.'s knowledge itself sufficiently material, specific, and non-speculative to constitute evidence of bias in the meaning of ER 611(b).

E.F. testified that she had a boyfriend, that she knew M.B. was on probation, and that she knew the underlying crimes which led to M.B.'s probation. 1RP 145-46. M.B. also testified that one of the conditions of his probation was to report when he had unapproved sexual contact, more specifically if he had sex. 1RP 207. Thus, the essential facts in support of M.B.'s defense theory were already placed on the record for the finder of fact. Further detail on E.F.'s knowledge of the exact crimes M.B. committed

have not been shown to be sufficiently material to affect the credibility of the witness under ER 611(b).

> d. M.B. had the means of introducing E.F.'s knowledge of his past sex offenses in support of his defense theory.

Appellant claims that his defense was "skewered" when the Trial Court barred further questioning of E.F. regarding her knowledge of M.B.'s past sex offenses during cross-examination. Appellant's Motion at 14. However, while defense counsel was not entitled to explore or develop the subject of E.F.'s knowledge of M.B.'s sex offenses on cross-examination, M.B. could have simply called E.F. as a defense witness and done so in direct examination. "Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense." State v. Cayetano-Jaimes, 190 Wash. App. 286, 295-98, 359 P.3d 919 (2015). "This right is a fundamental element of due process." Id. After calling her as a witness, defense counsel could have attempted to impeach E.F.'s credibility during direct examination after ascertaining the extent of her knowledge of M.B.'s past sex offenses.

> The credibility of a witness may be attacked by any party, including the party calling the witness.

ER 607.

Additionally, during defense's direct examination of M.B., the Court allowed defense counsel to ask whether M.B. was on probation. 1RP 204-07. As defense counsel began exploring the details of M.B.'s probation, including what constituted "unapproved sexual contact," The Court overruled the State's objection on relevance. Id. at 204. The Court allowed defense counsel the opportunity to proceed after the defense argued that the sought information spoke to E.F.'s credibility. Id. "It affects her motive. It affects her reasoning and her ability to accuse my client of rape." Id. at 205. The Court cautioned defense counsel that this would allow the State to explore the subject of M.B.'s past sex offenses in detail on cross-examination, which likely would not benefit his defense. Id. at 207. Nevertheless, defense counsel had the option of proceeding with that line of inquiry, which she chose not to do. Id.

E.F. had admitted during cross-examination that she learned at the family meeting on April 30, 2016 that M.B. was on probation, and further stated that she knew what the probation was for. 1RP 145-46. Defense counsel could have proceeded in direct examination of M.B. with detailing the conditions of his probation

resulting from past sex offenses, and connected this with E.F.'s testimony to show that she knew of his past sex offenses. This may have opened up M.B. to exploration of his past sex offenses in detail by the prosecution, as the Judge warned. However, such exploration would still likely have taken place anyway if M.B. had been able to explore E.F.'s knowledge of his sex offenses during earlier cross-examination. More importantly, if E.F.'s knowledge of M.B.'s past sex offenses was truly material to his defense, as he now claims, then M.B. would still have introduced this information on direct examination.

e. Introduction of E.F.'s alleged knowledge of M.B.'s past sex offenses would still not have affected the trial outcome.

The determinative factor in the Judge's decision in this case was whether M.B. or E.F. was more credible. 1RP 258. During closing argument, defense counsel essentially raised the defense theory that appellant now claims he was denied the opportunity to present. "Her behavior is much more consistent with someone who had sex consensually and was afraid of being found out." 1RP 252. "And remember, she knew that Mason was on Probation." Id. "She could assume that people would believe her if she said that Mason raped her." Id. However, the Judge clearly did not find this theory

persuasive, and did not view E.F. as being less credible or M.B. being more credible based on this argument. There is no guarantee that more detailed introduction of E.F.'s knowledge of M.B.'s sex offenses would have made her seem less credible, because defense counsel already referred to that knowledge in closing argument.

Instead, it is far more likely that introduction of his past sex offenses would have made M.B. appear even less credible, without aiding his defense. Judge Wickham stated that he was already skeptical of the credibility of M.B.'s testimony. 1RP 260. He also had warned that he didn't think discussion of M.B.'s past sex offenses would be beneficial to his defense. 1RP at 206. In his role as finder of fact, the Judge also noted that he did not consider MB's criminal history in this case. 1RP 257-58. If the Judge had in fact considered the defendant's criminal history, it is likely the trial result would have been the same. The defendant pleaded guilty to two separate sex crimes within two years of this incident. In light of M.B.'s past offenses and status as a probationer, the Judge likely would have viewed the credibility M.B.'s testimony with even more skepticism. Moreover, a reasonable finder of fact could easily draw

an escalating pattern of misconduct by M.B., further increasing the likelihood that this defendant raped the victim.

2. The court's late filing of the findings of fact and conclusions of law does not require reversal.

a. Standard of review.

"The court shall enter written findings and conclusions in a case that is appealed ... The prosecution must submit such findings and conclusions within 21 days ..." Wash. JuCR 7.11(d). Furthermore, "In a case tried without a jury, the court shall enter findings of fact and conclusions of law." Wash. CRR 6.1(d). The purpose of Wash. CRR 6.1(d) is to enable the appellate court to review questions raised on appeal. State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998). Written findings of fact are important because oral opinions do not have the same binding effect, Id., and the appellate court should not have to review oral rulings. Id. at 624.

In State v. Head, the petitioner maintained that the absence of written findings of fact required reversal, Id. at 620, and the court instead remanded for entry of findings. Id. at 626. The court stated that reversal on these grounds may be appropriate if the defendant can show they were prejudiced by the lack of written findings, or

that the findings were tailored to meet the issues on appeal. Head, 136 Wn.2d at 624-25.

The Washington State Supreme Court considered the timeliness of findings under JUCR 7.11 in State v. Alvarez, 128 Wn. 2d 1, 904 P.2d 754 (1995). In Alvarez, the Court found that "an error by the court in entering judgment and sentence without findings of fact is remedied by subsequent entry of findings, conclusions and judgment." Id. at 19.

The Court in Alvarez followed the analysis from State v. Royal, in that dismissal based solely on the untimely filing of written findings of fact is not per se merited, and the defendant must first show prejudice. Alvarez, 128 Wn.2d at 18 (1995) (citing State v. Royal, 122 Wn.2d 413, 424, 858 P.2d 259 (1993). Although the trial court had not complied with JuCR 7.11(d), the situation in Alvarez could be remedied without prejudice, and the petitioner would not be subject to double jeopardy because there would not need to be a new trial, but the only purpose would be for adequate findings. Alvarez, 128 Wn.2d at 20-22. The Court in Alvarez also followed State v. Souza, which allowed for remand to establish a more adequate finding of facts, and stating that it did not subject

the petitioner to double jeopardy. Alvarez, 128 Wn. 2d at 20-22 (citing State v. Souza, 60 Wn. App. 534, 805 P.2d 237 (1991)).

b. Later entry of written findings of fact and conclusions of law has not prejudiced the defendant.

In the case at hand, M.B. has not shown prejudice from the later filing of written findings of fact and conclusions of law. The findings of fact and conclusions of law were based on the trial court's detailed oral ruling and are consistent with the verbal findings given by the presiding trial court judge. Additionally, the written findings of fact and conclusions of law have since been entered, thus the situation has been remedied without prejudice to the appellant.

D. CONCLUSION.

The trial court did not deprive M.B. of his constitutional rights, and reversal is not merited based on later entry of written findings of fact and conclusions of law. The State respectfully asks this court to affirm M.B.'s conviction for Rape in the Second Degree.

Respectfully submitted this 25 day of July, 2017.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent on the date below as follows:

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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 27th day of July, 2017, at Olympia, Washington.

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THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

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